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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LINDSAY DUNN,

11 Plaintiff,

12 v.

13 BNSF RAILWAY COMPANY,

14 Defendant.

CASE NO. C17-0333JLR

ORDER

15 **I. INTRODUCTION**

16 Plaintiff Lindsay Dunn brought this action against his former employer, Defendant
17 BNSF Railway Company (“BNSF”), alleging that BNSF violated the Federal Railroad
18 Safety Act (“FRSA”), 49 U.S.C. § 20109, when it retaliated against him in various ways
19 after he had engaged in activities protected under the FRSA. (Compl. (Dkt. # 1) ¶¶ 7-11.)
20 This matter is before the court on BNSF’s motion to dismiss under Federal Rules of Civil
21 Procedure 12(b)(1) and 12(b)(6). (MTD (Dkt. # 6).) The court has considered the
22 parties’ submissions in support of and in opposition to the motion, the relevant portions

1 of the record, and the applicable law. Being fully advised,¹ the court GRANTS in part
2 and DENIES in part BNSF's motion to dismiss; ORDERS Mr. Dunn to show cause
3 within seven (7) days why the court should not dismiss his failure to offer alternative
4 handling claim for lack of subject matter jurisdiction; DISMISSES with prejudice his
5 December 17, 2014, suspension and investigation claims; and DISMISSES with leave to
6 amend the remainder of his retaliation claims.

7 **II. BACKGROUND**

8 This case arises from Mr. Dunn's employment with BNSF, a railroad carrier that
9 engages in interstate commerce. (Compl. ¶¶ 2-3.) Over the course of his employment,
10 Mr. Dunn and BNSF have been involved in several other lawsuits, two of which are
11 relevant here.² Thus, the court recites the relevant portions of the two previous suits
12 before discussing the material facts of the present action.

13 **A. Previous Litigation Between Mr. Dunn and BNSF**

14 Mr. Dunn initiated the first suit relevant to matters raised here in January of 2014.
15 In that case, he alleged that BNSF violated the FRSA by taking unfavorable employment
16 action—specifically in regard to leave time—against him in retaliation for his December
17 2007 report of a work-related injury. (Compl. ¶ 7b; Endres Decl. (Dkt. # 7) ¶ 3, Ex. B at
18 9-10; *see also Dunn v. BNSF Ry. Co.*, No. C14-1621JLR, Dkt. # 1 (W.D. Wash.) (“*Dunn*

19 ¹ Mr. Dunn requests oral argument, but the court finds that oral argument would not be
20 helpful to its disposition of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

21 ² Because BNSF raises arguments that necessarily require the court to consult past
22 litigation (MTD at 12, 19-21), the court takes judicial notice of the publically filed court
documents associated with these two previous actions, *see Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (allowing the court to take judicial notice of matters of public record that are not subject to reasonable dispute).

1 *I*’). The parties stipulated to dismiss the suit with prejudice. (Endres Decl. ¶ 3, Ex. B at
2 28-29.)

3 In June 2015, BNSF filed the second suit against Mr. Dunn for allegedly falsifying
4 mileage information and, as a result, receiving overpayment.³ (*Id.* ¶ 4, Ex. C at 5-6.; *see*
5 *also BNSF Ry. Co. v. McArthur*, No. C15-0992RAJ, Dkt. # 1 (W.D. Wash.) (“*Dunn II*”).)
6 In his motion to dismiss that suit, Mr. Dunn argued that the federal court was without
7 jurisdiction to hear the case because the Railway Labor Act (“RLA”) preempted BNSF’s
8 tort suit. (Endres Decl. ¶ 4, Ex. C at 32.) He pointed out that determining whether he had
9 properly recorded his mileage depended upon a provision of the collective bargaining
10 agreement (“CBA”) between his union and BNSF, and when it is necessary to interpret
11 the CBA to resolve a dispute, the RLA requires exclusive use of its procedural
12 mechanisms and generally preempts other simultaneous actions. (*Id.* at 24, 33.) The
13 court agreed that it could not resolve the mileage dispute without consulting the CBA,
14 and that the RLA demands such disputes be settled through binding arbitration. (*Id.* at
15 126-27.) Thus, it dismissed the suit for lack of subject matter jurisdiction. (*Id.* at 128.)

16 **B. Present Retaliation Suit**

17 Mr. Dunn now asserts that BNSF took the following six adverse actions against
18 him during the course of his employment. The first three unfavorable actions occurred
19 on December 17, 2014: (1) Mr. Dunn was “pulled . . . out of service without pay,” (2)

21 ³ BNSF also named several other former employees as defendants (*see* Endres Decl. ¶ 4,
22 Ex. C at 2), but because they are not relevant to the present action, the court focuses solely on
how the case relates to Mr. Dunn.

1 told that he was being investigated for work-related conduct, and (3) was refused the
2 option for “alternative handling.” (Compl. ¶¶ 8a-8c.) Then, on or around March 25,
3 2015, he was (4) subjected to an investigatory hearing and (5) ultimately terminated a
4 month later, on or around April 10, 2015. (*Id.* ¶¶ 8d-8e.) For each of the above
5 disciplinary actions, BNSF (6) documented the action taken against Mr. Dunn on his
6 employment record, “creating a potential for blacklisting.” (*Id.* ¶ 8f.) Mr. Dunn
7 maintains that BNSF took these six actions in retaliation for various protected activities
8 that he engaged in, including reporting a work-related personal injury in December of
9 2007 (*id.* ¶ 7a); filing a whistleblower complaint with the Occupational Safety and Health
10 Administration (“OSHA”) in January of 2014 (*id.* ¶ 7b); raising “a number of safety-
11 related concerns” in November of 2014, “including but not limited to requesting that
12 notes be kept at safety meetings” (*id.* ¶ 7c); and attempting to comply with federal law in
13 accurately reporting his time slips (*id.* ¶ 7d).

14 Based on BNSF’s alleged retaliation, Mr. Dunn filed a complaint with OSHA on
15 or about July 23, 2015, alleging that BNSF had violated the FRSA. (*Id.* ¶ 4.) The
16 Secretary of Labor (“the Secretary”) issued preliminary findings, to which Mr. Dunn
17 objected. (Endres Decl. ¶ 5, Ex. D. at 3-4, 7.)⁴ After 210 days elapsed since Mr. Dunn
18 filed his original complaint without a final decision from the Secretary, he transferred his
19 complaint to federal court for *de novo* review. (Compl. ¶ 4; *see also* 49 U.S.C.
20 § 20109(d)(3).)

21
22 ⁴ In considering a motion to dismiss, the court may “take judicial notice of public records,
including the ‘records and reports of administrative bodies’ such as OSHA.” *Fadaie v. Alaska*

III. ANALYSIS

BNSF moves to dismiss Mr. Dunn’s FRSA claims under both Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (MTD at 2.) The court now addresses each basis for dismissal in turn.

A. Dismissal for Lack of Subject Matter Jurisdiction

Although BNSF characterizes its motion as a Rule 12(b)(1) motion to dismiss, it references a lack of subject matter jurisdiction only in passing. First, BNSF asserts that “estoppel binds [Mr. Dunn] to the argument that his entitlement to wages . . . must be, and is being, arbitrated under the [RLA], depriving the [c]ourt of subject matter jurisdiction over his lost wages claim.” (MTD at 2 (footnote omitted); *see also id.* at 21 (stating that Mr. Dunn is “bound by his RLA preemption argument relating to wage loss, which deprives this [c]ourt of subject matter jurisdiction”).) It then mentions a lack of jurisdiction again when discussing BNSF’s refusal to offer Mr. Dunn “alternative handling” after he was suspended in December of 2014: “[W]hether or not [Mr. Dunn] is entitled to alternative handling can only be determined by interpreting [his CBA], thus any related claim is preempted by the [RLA].”⁵ (*Id.* at 17.) It is unclear whether BNSF

Airlines, Inc., 293 F. Supp. 2d 1210, 1214 (W.D. Wash. 2003) (quoting *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003)). Accordingly, the court takes judicial notice of the records related to Mr. Dunn’s OSHA proceedings.

⁵ BNSF additionally references the court’s jurisdiction when presenting a statute of limitations argument. (*See* MTD at 16.) Mr. Dunn, however, insists that the time limit for filing as stated in the FRSA is not a jurisdictional requirement. (MTD Resp. at 11-14 (analogizing to the time limit in Title VII, which is not a jurisdictional requirement).) The court finds it unnecessary to address the characterization of the time-bar issue, because even accepting Mr. Dunn’s argument, the limitations period was also raised as a basis for 12(b)(6) dismissal. (*See*

1 asserts that judicial estoppel deprives the court of jurisdiction, or whether it argues that
2 the RLA preempts only the alternative handling claim. Nonetheless, the court addresses
3 both contentions.

4 1. Legal Standard

5 Under Rule 12(b)(1), the court must dismiss claims over which it lacks subject
6 matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A motion to dismiss for lack of subject
7 matter jurisdiction is either facial or factual. *See Safe Air for Everyone v. Meyer*, 373
8 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger asserts that the
9 allegations contained in a complaint are insufficient on their face to invoke federal
10 jurisdiction.” *Id.* “The district court resolves a facial attack as it would a motion to
11 dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as true and drawing all
12 reasonable inferences in the plaintiff’s favor, the court determines whether the allegations
13 are sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v. Crane Co.*, 749
14 F.3d 1117, 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir.
15 2013)). However, if the moving party “convert[s] the motion to dismiss into a factual
16 motion by presenting affidavits or other evidence properly brought before the court, the
17 party opposing the motion must furnish affidavits or other evidence necessary to satisfy
18 its burden of establishing subject matter jurisdiction.” *Savage v. Glendale Union High*
19 *Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *St.*
20 *Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)). In either instance, the party

21 _____
22 MTD at 16.) Accordingly, the issue of whether Mr. Dunn’s claims are time-barred will be
addressed below. *See infra* § III.B.4.a.

1 asserting its claims in federal court bears the burden of establishing subject matter
2 jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

3 2. Judicial Estoppel

4 To the extent that BNSF argues that judicial estoppel strips the court of
5 jurisdiction, it misapprehends the nature of the doctrine. Judicial estoppel is an
6 “equitable doctrine invoked by a court at its discretion.” *New Hampshire v. Maine*, 532
7 U.S. 742, 750 (2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990))
8 (internal quotation marks omitted). Courts consider judicial estoppel an affirmative
9 defense that does not affect a court’s jurisdiction. *See Khadera v. ABM Indus. Inc.*, No.
10 C08-0417RSM, 2012 WL 581402, at *2 (W.D. Wash. Feb. 21, 2012); *Idearc Media LLC*
11 *v. Glassman*, No. 10-1216, 2011 WL 570017, at *2 (E.D. Pa. Feb. 15, 2011). As such, an
12 argument claiming judicial estoppel is more properly considered under Rule 12(b)(6).
13 *See Black v. Midland Credit Mgmt., Inc.*, No. C13-5626RBL, 2013 WL 5140181, at *1
14 (W.D. Wash. Sept. 12, 2013) (“While dismissal on 12(b)(6) grounds is generally
15 disfavored, a court may dismiss a claim when the plaintiff has included allegations
16 disclosing some absolute defense or bar to recovery, such as judicial estoppel.”). Thus,
17 even if judicial estoppel were to bar this suit, it would not deprive the court of
18 jurisdiction; accordingly, the court addresses the merits of BNSF’s judicial estoppel
19 argument in its 12(b)(6) analysis. *See infra* § III.B.5.

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1 3. Preemption of Alternative Handling Claim

2 BNSF next argues that the court is without jurisdiction to adjudicate Mr. Dunn’s
3 alternative handling claim,⁶ which BNSF contends would require interpretation of the
4 CBA and is thus preempted by the RLA. (MTD at 17; Reply at 9.) One of the purposes
5 of the RLA is “to provide for the prompt and orderly settlement of all disputes growing
6 out of . . . the interpretation or application of agreements covering rates of pay, rules, or
7 working conditions.” 45 U.S.C. § 151a(5). In pursuit of this goal, the RLA establishes a
8 “mandatory arbitral mechanism” when there are disputes concerning “the interpretation
9 or application of [CBAs],” such as “controversies over the meaning of an existing [CBA]
10 in a particular fact situation.” *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53
11 (1994) (quoting *Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 33 (1957))
12 (internal quotation marks omitted). These disputes, known as “minor disputes,” are
13 within the exclusive jurisdiction of an arbitrator, and therefore, any federal suit involving
14 minor disputes would be preempted. *See id.* at 253.

15 BNSF maintains that Mr. Dunn’s alternative handling claim involves a “minor
16 dispute” because the court must ascertain whether Mr. Dunn was entitled to alternative
17 handling in the first place, a determination that requires interpretation of the CBA. (MTD
18 at 17; Reply at 9.) As support, it cites to *Brisbois v. Soo Line Railroad Company*, 124 F.
19 Supp. 3d 891 (D. Minn. 2015), a FRSA case where the employee claimed several adverse

20 ⁶ Mr. Dunn does not specify what “alternative handling” is. (*See* Compl. ¶ 8c.) The
21 court assumes that it is an alternate form of discipline that BNSF may employ after an alleged
22 infraction. *See Davis v. BNSF Ry. Co.*, No. 12C3992, 2015 WL 1538784, at *2 (N.D. Ill. Mar.
30, 2015) (describing alternative handling as “an alternative approach to discipline that stresses
training and counseling”).

1 actions, such as denial of reimbursements and promotions. *See id.* at 897. The court
2 observed that to decide whether retaliation occurred, it had to first determine whether the
3 employee was entitled to those reimbursements and promotions—determinations that
4 were “dependent on the CBA” because the employee could not identify anything outside
5 of the CBA that granted her such entitlement. *Id.* Because it would be “impossible for
6 the Court to adjudicate [the employee’s] claims without interpreting the provisions of the
7 CBA,” those claims were minor disputes that were preempted by the RLA. *Id.*

8 Here, Mr. Dunn provides the court with little information about what alternative
9 handling is, let alone from where his entitlement to alternative handling derives. (*See*
10 Compl. ¶ 8c.) And in response to BNSF’s contentions, Mr. Dunn suggests vaguely that
11 the FRSA itself may give rise to rights and obligations independent of his CBA, with no
12 specific reference to alternative handling. (*See* MTD Resp. at 18 (“The [FRSA] therefore
13 imposes rights and obligations that exist independent of [Mr.] Dunn’s CBA, and any
14 argument to the alternative is simply unavailing.”).) From Mr. Dunn’s inability to
15 ascertain the origin of his entitlement to alternative handling, it appears to the court that,
16 like in *Brisbois*, the “only source of any entitlement . . . would be the CBA.” *See* 124 F.
17 Supp. 3d at 897. But without the CBA or any information specific to the terms of Mr.
18 Dunn’s employment, the court cannot reach any conclusion, as the *Brisbois* court did,
19 regarding his right to alternative handling and whether it requires interpretation of the
20 CBA.⁷

21
22 ⁷ The court recognizes that BNSF points to several cases in other jurisdictions where the
right to alternative handling was covered by the CBA. (*See* Reply at 9 n.2.) But cases involving

1 Accordingly, the court orders Mr. Dunn to show cause, within seven (7) days, why
2 his alternative handling claim should not be dismissed for lack of subject matter
3 jurisdiction. In his submission, Mr. Dunn must state specifically where his right to
4 alternative handling originates, if not from the CBA. He must respond to this order no
5 later than seven (7) days of the entry of this order. If he does not timely comply with this
6 order, or otherwise fails to adequately respond, the court will dismiss his claim of
7 alternative handling for lack of subject matter jurisdiction.

8 **B. Dismissal for Failure to State a Claim**

9 The court now considers BNSF's various arguments for Rule 12(b)(6) dismissal of
10 Mr. Dunn's FRSA retaliation claims. The FRSA serves "to promote safety in every area
11 of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C.
12 § 20101. Pursuant to the FRSA, a railroad carrier, such as BNSF, may not "discharge,
13 demote, suspend, reprimand, or in any other way discriminate against an employee if
14 such discrimination is due, in whole or in part," to an employee's engagement in a
15 protected activity. *Id.* § 20109(a). To state a claim of retaliation under the FRSA, a
16 plaintiff bears the initial burden of pleading sufficient facts that demonstrate "(1) he
17 engaged in a protected activity; (2) the employer knew he engaged in the allegedly
18 protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected
19 activity was a contributing factor in the unfavorable personnel action." *Rookaird v.*
20 *BNSF Ry. Co.*, No. C14-176RSL, 2015 WL 6626069, at *2 (W.D. Wash. Oct. 29, 2015);

21 _____
22 other BNSF employees in other regions do not, standing alone, inform the court about Mr.
Dunn's entitlement to alternative handling.

1 *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *cf.*
2 *Tamosaitis v. URS Inc.*, 781 F.3d 468, 481 (9th Cir. 2015) (reciting the prima facie case
3 for an analogous Energy Reorganization Act retaliation claim).⁸ If the plaintiff
4 establishes this prima facie case, the burden shifts to the railroad carrier to demonstrate
5 “by clear and convincing evidence that [it] would have taken the same unfavorable
6 personnel action in the absence of the protected activity.” *Rookaird*, 2015 WL 6626069,
7 at *2; *cf. Tamosaitis*, 781 F.3d at 481.

8 BNSF argues that Mr. Dunn fails to state a claim on three of the above elements
9 necessary for a prima facie showing. First, it insists that the complaint be dismissed in
10 whole because Mr. Dunn did not plead sufficient factual allegations relating to the
11 contributing factor element. (MTD at 11-12.) In the alternative, it asserts that the
12 pleadings surrounding the elements of protected activity and adverse action are
13 insufficient, and thus the complaint fails to state a claim upon which relief can be
14 granted. (*Id.* at 12-19.)

15 1. Legal Standard

16 Dismissal for failure to state a claim “is proper if there is a lack of a cognizable
17 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”
18 *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (internal quotation
19 marks omitted). “To survive a motion to dismiss, a complaint must contain sufficient

20 ⁸ The parties disagree over whether BNSF’s knowledge of Mr. Dunn’s purported
21 engagement in a protected activity is a standalone element of FRSA retaliation, or whether it is
22 merely a factor to consider in the contributing-factor analysis. (See MTD Resp. at 7-8 n.10;
Reply at 3 n.1.) The court need not resolve this question of law, because BNSF’s knowledge is
not currently in dispute.

1 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
2 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.
3 544, 570 (2007)); see *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir.
4 2010). “A claim has facial plausibility when the plaintiff pleads factual content that
5 allows the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” *Iqbal*, 556 U.S. at 678. “Mere conclusory statements” or
7 “formulaic recitation[s] of the elements of a cause of action,” however, “are not entitled
8 to the presumption of truth.” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir.
9 2012) (citing *Twombly*, 550 U.S. at 555).

10 When considering a motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving
12 party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.
13 2005). The court must accept all well-pleaded facts as true and draw all reasonable
14 inferences in favor of the plaintiff. *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 135
15 F.3d 658, 661 (9th Cir. 1998). On a motion to dismiss, the court may consider the
16 pleadings, documents attached to the pleadings, documents incorporated by reference in
17 the pleadings, or matters of judicial notice. *Ritchie*, 342 F.3d at 908 (citing *Van Buskirk*
18 *v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002)).

19 2. Contributing Factor

20 BNSF first argues that Mr. Dunn failed to assert “any facts sufficient to support
21 the contributing factor allegation.” (MTD at 11.) Instead, BNSF maintains that Mr.
22 Dunn’s allegations regarding this element boil down to one “bare conclusory allegation”:

1 BNSF, its officers, employees, contractors, and/or subcontractors took those
2 actions to discipline, suspend, reprimand, place on probation, demote, or in
3 some other way discriminate against Mr. Dunn due, in whole or in part, to
the fact that he had engaged in one or more of the protected activities outlined
above.

4 (Reply at 2 (quoting Compl. ¶ 10).) The court agrees that this recitation of the statutory
5 language, *see* 49 U.S.C. § 20109(a), constitutes nothing more than a “‘naked assertion’
6 devoid of ‘further factual enhancement.’” *See Iqbal*, 556 U.S. at 678 (quoting *Twombly*,
7 550 U.S. at 557).

8 To plausibly state a claim of retaliation, Mr. Dunn must plead factual content that
9 allows the court to reasonably infer that his protected activity was a contributing factor to
10 BNSF’s alleged retaliatory actions. *See Rookaird*, 2015 WL 6626069, at *5; *Araujo*, 708
11 F.3d at 157. A contributing factor is “any factor which, alone or in connection with other
12 factors, tends to affect in any way the outcome of the decision.” *Kuduk v. BNSF Ry. Co.*,
13 768 F.3d 786, 791 (8th Cir. 2014) (internal quotation marks omitted). That a protected
14 activity was a contributing factor can be shown by alleging facts regarding “temporal
15 proximity, indications of pretext, and a change in the employer’s attitude toward the
16 employee after he engages in protected activity.” *Rookaird*, 2015 WL 6626069, at *5.

17 Here, Mr. Dunn’s contributing factor allegation amounts to “a formulaic recitation
18 of [an] element[] of a cause of action.” *See Twombly*, 550 U.S. at 555. He alleges that
19 BNSF took adverse actions “due, in whole or in part, to the fact that he had engaged
20 in . . . protected activities,” (Compl. ¶ 10), but includes no factual content of any kind or
21 specificity to support this conclusory allegation. The court therefore cannot plausibly
22 infer that Mr. Dunn’s protected activities were a contributing factor to BNSF’s

1 unfavorable personnel actions taken against him. Accordingly, the court dismisses Mr.
2 Dunn’s retaliation claims against BNSF for failure to state a claim upon which relief may
3 be granted.⁹

4 3. Protected Activities

5 Additionally, BNSF raises several challenges to Mr. Dunn’s asserted protected
6 activities. (MTD at 12-15.) To sustain a retaliation claim under the FRSA, a plaintiff
7 must have engaged in a protected activity. *Rookaird*, 2015 WL 6626069, at *2; *Araujo*,
8 708 F.3d at 157. The FRSA specifies what constitutes a protected activity, grouping
9 them generally into three categories: (1) providing information pertaining to the
10 investigation of or proceeding about a violation of safety regulations, *see* 49 U.S.C.
11 § 20109(a); (2) reporting or refusing to work around a hazardous safety condition, *see id.*
12 § 20109(b); and (3) requesting medical treatment for a work-related injury, *see id.*
13 § 20109(c). BNSF takes issue with three of the four protected activities that Mr. Dunn
14 alleges to have taken part in: (1) reporting a work-related injury in December 2007; (2)
15 raising “safety-related concerns” in November 2014; and (3) complying with federal law
16 by accurately reporting his time slips in December 2014. (MTD at 12-15.)

17 a. *December 2007 Report of Work-Related Injury*

18 BNSF contends that Mr. Dunn’s injury report in December 2007 is “subject to res
19 judicata” because it was already adjudicated in *Dunn I*—a previous suit where Mr. Dunn

20 ⁹ Although the court dismisses the retaliation claims as a whole due to the insufficiency
21 of the contributing factor element, it proceeds to address BNSF’s additional challenges to Mr.
22 Dunn’s asserted protected activities and adverse actions. The court does so as a matter of
judicial efficiency, as Mr. Dunn will be given leave to amend his complaint and should take that
opportunity to address all of the insufficiencies the court identifies.

utilized the same protected activity as a basis for a FRSA retaliation suit.¹⁰ (MTD at 12; *see also* Endres Decl. ¶ 3, Ex. B at 9-10.) The court disagrees. Res judicata bars successive lawsuits only when the two suits involve an “identity of claims,” meaning “a single cause of action which was or should have been placed from the judiciary as a unified whole.” *Fadaie v. Alaska Airlines, Inc.*, 293 F. Supp. 2d 1210, 1217 (W.D. Wash. 2003). In determining whether successive suits involve a single cause of action, the court considers:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). The last of these factors—the same transactional nucleus of facts—is the most important. *Id.*

Here, Mr. Dunn’s present FRSA suit and his previous FRSA suit in *Dunn I* do not arise out of the same transactional nucleus of facts. Although both suits reference the same work injury report in December 2007, the adverse actions alleged here, including Mr. Dunn’s suspension and ultimate termination, had yet to occur at the time of *Dunn I*. (*See* Compl. ¶¶ 7b, 8.) Thus, the two suits do not, and could not, arise out of the same

¹⁰ From the outset, it is unclear whether an alleged protected activity, standing alone, may be subject to res judicata, because merely engaging in a protected activity does not constitute a retaliation claim. *See Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (characterizing res judicata, or claim preclusion, as a bar on claims). Instead, engagement in one or more protected activities is a necessary element to support a retaliation claim. *See Araujo*, 708 F.3d at 157. Thus, BNSF’s characterization of the December 2007 injury report as a “protected activity claim” is questionable (*see* MTD at 12); nonetheless, the court proceeds to analyze the res judicata argument as a bar on the FRSA claim that is based upon this protected activity.

1 transactional nucleus of facts, as one critical set of facts—the events leading up to Mr.
2 Dunn’s termination—would not occur for another 11 months or so after the initiation of
3 *Dunn I.* (*See id.*); *see also Fadaie*, 293 F. Supp. 2d at 1218 (declining to apply res
4 judicata when the employee “could not have raised a retaliation claim regarding his
5 termination because it had not yet occurred when the agency considered his other
6 claims”). Thus, it is impossible to conclude that Mr. Dunn could have or should have
7 raised his termination-related retaliation claims in the earlier proceeding, and the court
8 rejects BNSF’s argument that the December 2007 work-related injury report is subject to
9 res judicata.¹¹ Accordingly, this protected activity survives as a basis for Mr. Dunn’s
10 retaliation claim.

11 *b. November 2014 Safety-Related Concerns*

12 Next, BNSF attacks Mr. Dunn’s allegation that he “raised a number of
13 safety-related concerns . . . including but not limited to requesting that notes be kept at
14 safety meetings” (Compl. ¶ 7c) as an insufficient “vague, [and] conclusory statement”
15 (MTD at 13). The court agrees. The law recognizes that some concerns, although
16 tangentially safety-related, are nonetheless not protected activities because they are not a
17 report of a hazardous safety condition, as required for the activity to be protected under
18 49 U.S.C. § 20109(b). *See Kuduk*, 768 F.3d at 789. Additionally, such activity would
19 not be protected under 49 U.S.C. § 20109(a), unless the “safety-related concerns” were

20 ¹¹ BNSF also alleges that Mr. Dunn’s December 2007 injury report fails because “[a]n
21 eight-year gap between reporting the injury and being removed from service in December
22 2014 . . . is far too long to support a connection.” (MTD at 12.) This argument is more properly
construed as an attack on the contributing factor requirement and thus will not be addressed here.
See supra § III.B.2.

1 associated with an employer's violation of a federal law, rule, or regulation regarding
2 railroad safety. *See* 49 U.S.C. § 20109(a)(1)-(3), (5)-(6). For instance, in *Kuduk v. BNSF*
3 *Railway Company*, an employee concern about the way a safety test was conducted did
4 not qualify as a protected activity because the employee did not explain how "the way
5 [the employer] conducted the test created a hazardous safety condition." 768 F.3d at 789.

6 In a similar vein, it is difficult to see how the lack of note-taking at safety
7 meetings creates a hazardous safety condition or is associated with a violation of railroad
8 safety law. And Mr. Dunn provides no additional facts outside of his one-sentence
9 statement to support his conclusory allegation that raising these concerns constitutes a
10 protected activity. (*See* Compl. ¶ 7, 7c.) The complaint does not explain the nature of
11 these concerns, whether any concerns involved violations of federal railroad safety laws,
12 or with whom Mr. Dunn shared these concerns. (*See generally id.*) Without more, the
13 court cannot reasonably infer that the concerns involved a railroad safety violation, as
14 protected by 49 U.S.C. § 20109(a), or that these concerns were reports of a hazardous
15 safety condition, as protected by 49 U.S.C. § 20109(b). Accordingly, the court rejects
16 this alleged protected activity as a theory to satisfy a required element of Mr. Dunn's
17 retaliation claim.

18 *c. December 2014 Time Slip Reporting*

19 Lastly, BNSF contests Mr. Dunn's assertion that he engaged in protected activity
20 by "attempt[ing] to comply with Federal Law in accurately reporting on his time slips."
21 (MTD at 13-15; Compl. ¶ 7d.) An employee's good faith act, undertaken to accurately
22 report hours on duty pursuant to federal law, constitutes a protected activity under the

1 FRSA. 49 U.S.C. § 20109(a)(7). But here, Mr. Dunn rests solely on a conclusory
2 allegation that his attempt to accurately report his time slips qualifies under this
3 provision, without providing any further factual assertions. It bears repeating that such
4 conclusory statements are not entitled to a presumption of truth, *see Iqbal*, 556 U.S. at
5 678, and once the court strips away this conclusory language, there are no factual
6 allegations remaining from which the court can reasonably infer that Mr. Dunn engaged
7 in a protected activity. As such, the court dismisses this alleged protected activity as a
8 theory to satisfy a required element of a retaliation claim.¹²

9 In sum, the court concludes that Mr. Dunn insufficiently pleads two of the asserted
10 protected activities: (1) his allegation that he raised a number of safety-related concerns
11 in November 2014 (Compl. ¶ 7c), and (2) his contention that he attempted to comply with
12 federal law to report his hours in December 2014 (*id.* ¶ 7d). *See supra* §§ III.B.3.b-c.
13 However, two other protected activities Mr. Dunn alleges in the complaint remain viable
14 theories upon which he may base his retaliation claim: (1) his report of a work-related
15 injury in December 2007 (*id.* ¶ 7a), and (2) his whistleblower complaint initiated in
16 January 2014 (*id.* ¶ 7b). *See supra* § III.B.3.a.

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19 ¹² BNSF assumes that this December 17, 2014, attempt to report hours is related to Mr.
20 Dunn's suspension on the same day, and raises several additional arguments based on that
21 assumption. (*See* MTD at 14-15.) Given that the court is not provided any factual allegations
22 surrounding this attempt to report hours, the court cannot determine whether, or if at all, it is
related to Mr. Dunn's December 17th suspension. Thus, the court is unable to address BNSF's
argument that Mr. Dunn has perjured himself, or that this purported protected activity could not
be the basis of a suspension that occurred earlier in the day. (*See* MTD at 14-15.)

1 4. Adverse Actions

2 Mr. Dunn claims that BNSF took six discrete adverse employment actions against
3 him (Compl. at ¶ 8), and BNSF challenges all six for failure to state a claim under Rule
4 12(b)(6) (MTD at 15-19). Because the court has already addressed one of the adverse
5 action claims—failure to offer alternative handling—in the Rule 12(b)(1) context, *see*
6 *supra* § III.A.3, it analyzes only the remaining adverse action claims here.¹³

7 *a. December 17, 2014, Suspension and Notification of Investigation*

8 BNSF argues that two of Mr. Dunn’s adverse action claims that occurred in
9 December 2014—BNSF pulling Mr. Dunn out of service without pay and notifying him
10 that he was under investigation—are time-barred. (MTD at 15-17.) The court agrees.
11 The FRSA requires that a party bringing a retaliation action file a charge within 180 days
12 of the alleged violation. 49 U.S.C. § 20109(d)(2)(ii). The statute “precludes recovery for
13 discrete acts of . . . retaliation that occur outside the statutory time period.” *Nat’l R.R.*
14 *Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002) (analyzing the analogous statute
15 of limitations under Title VII). “A party, therefore, must file a charge within [the
16 specified number of days] of the date of the [alleged retaliatory act] or lose the ability to
17 recover for it.” *Id.* at 110. Although recovery for any action outside the 180-day period

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20 ¹³ Whereas a “protected activity claim” is a misnomer because engagement in a protected
21 activity merely satisfies an element of a retaliation claim, *see supra* § III.B.3.a n.10, courts do
22 consider each purported adverse action taken by an employer to be the basis of separate claims of
retaliation, *see Wallis v. BNSF Ry. Co.*, No. C13-40TSZ, 2013 WL 12073476, at *4 (W.D. Wash.
Dec. 30, 2013). Thus, the court considers Mr. Dunn’s six alleged adverse actions to be asserting
six claims of unlawful retaliation.

1 is barred, an employee may still use “the prior acts as background evidence in support of
2 a timely claim.” *Id.* at 113.

3 Here, Mr. Dunn did not file his initial complaint with the Secretary until July 23,
4 2015. (Compl. ¶ 4.) Thus, the actionable time frame runs from January 24, 2015, to July
5 23, 2015. Any supposed retaliatory action that occurred before January 24, 2015, is not
6 actionable, even when that action is related to acts alleged in timely filed charges. *See*
7 *Morgan*, 536 U.S. at 113. Accordingly, neither the suspension without pay nor the
8 notification of investigation that occurred on December 17, 2014, is actionable, and to the
9 extent these discrete acts form the basis of Mr. Dunn’s retaliation claim, recovery is
10 time-barred.

11 Mr. Dunn does not dispute that the December 17th actions fall outside the
12 permitted time-window. Instead, he argues only that the 180-day limit under the FRSA
13 “is not a jurisdictional requirement,” and that BNSF’s time-bar contention is “not
14 properly raised under Fed. R. Civ. P. 12(b).” (MTD Resp. at 14.) This argument is
15 mistaken. Even assuming Mr. Dunn is correct that the 180-day filing limit is not
16 jurisdictional, that only precludes BNSF from raising a timeliness challenge under Rule
17 12(b)(1)—the provision addressing the court’s subject matter jurisdiction. Dismissal
18 would still be appropriate under Rule 12(b)(6) if “the running of the statute is apparent on
19 the face of the complaint.” *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir.
20 2006) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980)) (internal
21 quotation marks omitted). And indeed, BNSF raises timeliness as a basis for 12(b)(6)
22 dismissal, arguing for 12(b)(1) dismissal only “in the alternative.” (MTD at 16; *see also*

1 *id.* at 12, 17.) Therefore, the court grants the dismissal of the two December 17, 2014,
2 adverse action claims as time-barred.

3 *b. March 2015 Investigatory Hearing*

4 BNSF next maintains that “holding an investigation, on its own, does not
5 constitute an adverse action.” (MTD at 17.) The FRSA prohibits a railroad carrier from
6 discharging, demoting, suspending, reprimanding, or “in any other way retaliat[ing]
7 against” an employee, “including but not limited to intimidating, threatening, restraining,
8 coercing, blacklisting, or disciplining, an employee for [engaging in protected
9 activities].” 29 C.F.R. § 1982.102(b)(2)(i). Those adverse actions include any treatment
10 that “is reasonably likely to deter employees from engaging in protected activity,” *Ray v.*
11 *Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000), and can cover a “wide array of
12 disadvantageous changes in the workplace,” *id.* at 1240.

13 BNSF argues that notification of a disciplinary investigation can never constitute
14 an adverse action, relying heavily on *Brisbois*. (MTD at 17-18; Reply at 9-10.) In that
15 case, the employee alleged that “merely being *accused* of violating workplace rules—and
16 having to address those accusations at a disciplinary hearing” is an adverse employment
17 action under the FRSA. 124 F. Supp. 3d at 902. The court rejected this argument. While
18 it acknowledged that “any investigation of a suspected rule violation carries an implicit
19 threat that, if the employee is found to have violated the rule, she might be disciplined,”
20 that is a “far cry” from an explicit threat of disciplinary action. *Id.* at 903. Thus, the
21 court dismissed the retaliation claim resting on the employer’s investigation. *Id.*

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1 Mr. Dunn responds that the definition of adverse action in the FRSA context must
2 be broader than what *Brisbois* declared. (MTD Resp. at 14-15.) It points to the broad
3 language of the FRSA, the Ninth Circuit’s expansive view of retaliation claims in
4 general, and the Secretary’s broad definition of FRSA adverse actions as “unfavorable
5 employment actions that are more than trivial, either as a single event or in combination
6 with other deliberate employer actions alleged,” *Fricka v. Nat’l R.R. Passenger Corp.*,
7 ARB No. 14-047, 2015 WL 9257754, at *3 (ARB Nov. 24, 2015). (MTD Resp. at
8 14-17.) Thus, Mr. Dunn contends that “notification of a disciplinary investigation” alone
9 can be an adverse action “if it is unfavorable and non-trivial.” (*Id.* at 17.)

10 The court need not determine whether an investigation alone constitutes an
11 adverse employment action, because even adopting Mr. Dunn’s proposed definition, his
12 allegation is insufficient. The complaint asserts only that “BNSF subjected Mr. Dunn to
13 an investigatory hearing.” (Compl. ¶ 8d.) It includes no other details about what the
14 hearing entailed, Mr. Dunn’s obligations during the hearing, or any negative impacts Mr.
15 Dunn suffered as a result of the hearing. (*See id.*) In fact, the complaint provides the
16 court with no information other than the fact that an investigatory hearing occurred. (*See*
17 *id.*) Thus, there are no factual allegations from which the court can reasonably infer that
18 the notification of a disciplinary investigation here was both unfavorable and non-trivial.
19 *See Fricka*, 2015 WL 9257754, at *3. The court therefore dismisses the March 2015
20 investigatory hearing claim for failure to state a claim.

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1 *c. April 10, 2015, Termination*

2 It is undisputed that “discharge” is one of the unfavorable personnel actions the
3 FRSA recognizes. 49 U.S.C. § 20109(a). Thus, Mr. Dunn’s termination from BNSF in
4 April 2015 undoubtedly qualifies as an adverse employment action, as provided for by
5 the statute. BNSF attacks, instead, the portion of the claim where Mr. Dunn asserts that
6 this termination was “because of his actions on or around December 17, 2014.” (MTD at
7 18.) This argument therefore is more squarely an attack on the contributing factor
8 element. Because the court has already addressed that element, *see supra* § III.B.2, it will
9 not entertain this argument about why Mr. Dunn was terminated, or how Mr. Dunn’s
10 purported reasons for his termination may have contradicted previous pleadings, none of
11 which is relevant to whether termination qualifies as an adverse action. Therefore, the
12 court concludes that Mr. Dunn’s termination in April 2015 is an adverse action under the
13 FRSA and denies BNSF’s motion to dismiss this claim.

14 *d. Potential Blacklisting*

15 Mr. Dunn asserts that BNSF took adverse action against him by noting “these
16 things” on his employment record, thus “creating a potential for blacklisting.” (Compl.
17 ¶ 8f.) BNSF claims that this statement alone does not create a “plausible basis to support
18 an allegation relating to blacklisting,” thus failing to state a claim upon which relief can
19 be granted. (MTD at 19.) The court agrees.

20 Although “blacklisting” an employee is an adverse action, *see* 29 C.F.R.
21 § 1982.102(b)(2)(i), Mr. Dunn does not allege that BNSF blacklisted him, only that
22 BNSF, through its record-keeping, created “a potential for blacklisting” (Compl. ¶ 8f). It

1 is also unclear what specifically BNSF documented in Mr. Dunn’s employment record, as
2 he alludes only vaguely to “these things.” (*See id.*) Without more factual allegations, the
3 court cannot reasonably infer that BNSF blacklisted Mr. Dunn and therefore dismisses
4 this potential blacklisting claim for failure to state a claim.

5 In summary, the court concludes that two of the six adverse action claims—
6 suspension and investigation in December 2014—are time-barred and are thus dismissed
7 with prejudice. *See supra* § III.B.4.a. Two additional adverse action claims—the March
8 2015 investigatory hearing and the potential blacklisting—are insufficiently pled and thus
9 also must be dismissed. *See supra* §§ III.B.4.b, d. However, one adverse action claim—
10 Mr. Dunn’s termination in April 2015—survives BNSF’s motion to dismiss. *See supra*
11 § III.B.4.c.

12 5. Judicial Estoppel

13 Lastly, BNSF argues that judicial estoppel bars Mr. Dunn from asking the court to
14 award him lost wages because he argued previously in *Dunn II* that wage computation is
15 governed by the CBA and thus falls outside this court’s jurisdiction. (MTD at 19-21.)
16 Judicial estoppel “precludes a party from gaining an advantage by asserting one position,
17 and then later seeking an advantage by taking a clearly inconsistent position.” *Hamilton*
18 *v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). This doctrine aims “to
19 prevent litigants from playing ‘fast and loose’ with the courts and to protect the integrity
20 of the judicial system.” *Ah Quin v. Cty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 271
21 (9th Cir. 2013). Three factors inform the court’s application of judicial estoppel. *See*
22 *New Hampshire*, 532 U.S. at 750. First, a party’s later position must be “clearly

1 inconsistent” with its earlier position. *Id.* Second, the party must have succeeded in
2 persuading a court to accept its earlier position. *Id.* And third, the party seeking to assert
3 an inconsistent position would “derive an unfair advantage or impose an unfair detriment
4 on the opposing party if not estopped.” *Id.* at 751.

5 *Russell v. Rolfs* illustrates the application of this doctrine. 893 F.2d at 1037-39. In
6 that case, judicial estoppel barred the state from opposing an appellant’s petition for
7 habeas relief. *Id.* at 1038. In a previous habeas proceeding, the state had argued that the
8 appellant ought to have pursued a state court remedy that was “adequate and available.”
9 *Id.* at 1034. Accepting this argument, the court denied that initial petition for failure to
10 exhaust state remedies. *Id.* But when the appellant pursued that remedy in a subsequent
11 petition for habeas relief, the state then “disregarded its previous representation . . . and
12 argued the petition was procedurally barred.” *Id.* at 1037. Because this later position—
13 that the remedy was unavailable—was clearly inconsistent with the earlier, accepted
14 position—that the remedy was adequate and available—judicial estoppel barred the state
15 from subsequently opposing the petition on the basis that the remedy was procedurally
16 barred. *Id.* at 1038-39.

17 Unlike the state in *Russell*, Mr. Dunn did not take any such clearly inconsistent
18 positions. BNSF asserts that Mr. Dunn cannot now seek lost wages as damages when in
19 *Dunn II*, he argued that calculation of wages can only be done by interpreting the CBA,
20 which would strip the federal court of jurisdiction. (MTD at 20.) But this
21 characterization misconstrues the exact argument made in *Dunn II*. There, in response to
22 various counts of tortious behavior, Mr. Dunn maintained that the issue of whether he

1 properly calculated and recorded his mileage was governed by the CBA. *See Dunn II*,
2 No. C15-0992RAJ, Dkt. # 54 at 2. He did not argue that the court had no jurisdiction to
3 award wage-related damages upon the finding of liability under an applicable federal
4 statute. And indeed, there is no indication that the damages in this case would involve
5 the proper calculation and input of mileage. Thus, Mr. Dunn’s earlier position in *Dunn*
6 *II*—that the CBA governs how mileage should be calculated and reported—is not clearly
7 inconsistent with his position here—that he be awarded back and front pay if BNSF is
8 found liable for unlawful retaliation. Accordingly, the court rejects BNSF’s contention
9 that Mr. Dunn be judicially estopped from requesting relief in the form of lost wages.

10 6. Leave to Amend

11 As a general rule, when a court grants a motion to dismiss, the court should grant
12 leave to amend. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52
13 (9th Cir. 2003) (citing Fed. R. Civ. P. 15(a)). The policy favoring amendment is to be
14 applied with “extreme liberality.” *Id.* at 1051. In determining whether dismissal without
15 leave to amend is appropriate, courts consider such factors as undue delay, bad faith or
16 dilatory motive on the part of the movant, repeated failure to cure deficiencies by
17 amendments previously allowed, undue prejudice to the opposing party by virtue of
18 allowance of the amendment, and futility of amendment. *Foman v. Davis*, 371 U.S. 178,
19 182 (1962).

20 Here, two of the adverse action claims alleged by Mr. Dunn are time-barred and
21 thus not actionable under the FRSA. *See supra* § III.B.4.a. Because these claims are

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1 | untimely, leave to amend would be futile, regardless of additional factual allegations.

2 | The court accordingly denies leave to amend as to these two claims.

3 | However, the court grants Mr. Dunn leave to amend his pleadings regarding the
4 | contributing factor element and his remaining insufficient adverse action claims. As the
5 | court explains above, the factual allegations supporting the contributing factor element
6 | and two of the adverse actions claims are deficient. *See supra* §§ III.B.2, III.B.4.b,
7 | III.B.4.d. However, it is conceivable that further nonconclusory factual allegations would
8 | adequately support Mr. Dunn's claims. Furthermore, although BNSF requests that leave
9 | to amend be denied, (Reply at 3), it makes no specific showing of undue delay, bad faith,
10 | or dilatory motive on Mr. Dunn's part, *see Foman*, 371 U.S. at 182. Therefore, the court
11 | concludes that leave to amend is appropriate as to the contributing factor element, the
12 | March 2015 investigatory hearing adverse action claim, and the potential blacklisting
13 | adverse action claim.

14 | As for the protected activity requirement, the court notes that two of the purported
15 | protected activities survive BNSF's motion to dismiss. *See supra* § III.B.3. Because an
16 | employee need only engage in one protected activity to sustain a retaliation claim, Mr.
17 | Dunn is not obligated to amend what he insufficiently pled: the November 2014
18 | safety-related concerns and the December 2014 attempt to lawfully report hours. But to
19 | the extent that he wishes to include these additional events as theories underlying his
20 | retaliation claim, he must provide further nonconclusory factual allegations that would
21 | adequately support their qualification as protected activities.

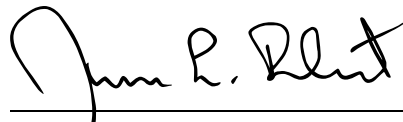
22 | //

1 If Mr. Dunn opts to amend his complaint, he must submit the amended complaint
2 within fourteen (14) days of the entry of this order. Unlike the original complaint, which
3 often utilizes only one sentence to describe allegations in a conclusory fashion, any
4 amended complaint must supply detailed factual information supporting the purported
5 assertions, from which the court may make reasonable inferences. Mr. Dunn must submit
6 with the amended complaint a redlined version of the complaint or a document that
7 otherwise identifies the changed or added factual allegations. *See* Local Rules W.D.
8 Wash. LCR 15. If Mr. Dunn fails to timely amend his complaint or fails to remedy the
9 pleading deficiencies identified herein, the court may treat that failure as evidence of
10 futility of further amendment.

11 IV. CONCLUSION

12 For the foregoing reasons, the court GRANTS in part and DENIES in part BNSF's
13 motion to dismiss (Dkt. # 6). The court further GRANTS Mr. Dunn leave to amend,
14 within fourteen (14) days, as set forth in this order. The court ORDERS Mr. Dunn to
15 show cause, within seven (7) days, why the court should not dismiss his retaliation claim
16 regarding the failure to offer alternative handling for lack of subject matter jurisdiction.

17 Dated this 25th day of August, 2017.

18
19 
20 JAMES L. ROBART
21 United States District Judge
22